Low Lee Lian v Ban Hin Lee Bank Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–259–1994
LAMIN PCA, ANUAR CJ (MALAYA) AND GOPAL SRI RAM JCA
5 DECEMBER 1996

Land Law *— Charge — Order for sale — Whether there exists cause to the contrary — What constitutes cause to the contrary — Procedure to be adopted by judge when hearing an application for an order for sale — National Land Code 1965 s 256(3)*

The appellant was the registered proprietor of a piece of land ('the land') that was charged to the respondent bank ('the bank') to secure a loan granted by the bank to a third party. The charge was duly registered in the appropriate land registry. When the third party defaulted in making repayment of the principal and interest, the bank applied to enforce the statutory charge by way of an order for sale. The appellant resisted the bank's application but the judge directed the sale of the land by public auction. The appellant appealed against that order. The appellant argued that the judge was wrong in granting the order for sale of the land. Counsel for the appellant, inter alia, submitted that: (a) the bank had varied the rate of interest without giving any notice of the same to the appellant; and (b) the bank had, without the appellant's knowledge, permitted the third party to breach the terms of the agreement between them. The main question that arose was whether, even if the complaints made by the appellant were made out, they constituted sufficient reason for the refusal of an order for sale by establishing 'cause to the contrary' under s 256(3) of the National Land Code 1965 ('the Code').

Held, dismissing the appeal:

(1) 'Cause to the contrary' within s 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale (see pp 82F–G, 83F and 83H–I); *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 and *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 followed.

(2) In the instant case, it was not sufficient to allege mere breaches by the bank of the loan agreement between the bank and the third party or even of the terms of the annexure to the charge in

order to resist the application under s 256(3) of the Code. The allegation that the bank acted in breach of contract, while it might give rise to an independent action in personam, was insufficient per se to defeat the ad rem rights of the bank under its registered charge to an order for sale. It was clear that the appellant had failed to meet the requisite legal test of what amounted to a cause to the contrary. The judge therefore correctly made the order for sale (see pp 87H and 89C).

Per curiam:

A judge hearing an application under s 256 of the Code must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary (see p 88D).

[Bahasa Malaysia summary

Perayu adalah tuanpunya berdaftar sebidang tanah ('tanah itu') yang digadaikan kepada bank penentang ('bank itu') untuk menjamin satu pinjaman yang diberikan oleh bank itu kepada satu pihak ketiga. Gadaian itu didaftarkan di pejabat pendaftaran tanah yang berkenaan. Apabila pihak ketiga itu ingkar membuat bayaran wang pokok dan bunga, bank itu memohon untuk melaksanakan gadaian statutori itu melalui satu perintah jualan. Perayu menentang permohonan bank itu tetapi hakim telah mengarahkan jualan tanah itu melalui lelong awam. Perayu merayu terhadap perintah itu. Perayu berhujah bahawa hakim itu telah tersilap ketika memberikan perintah untuk jualan tanah itu. Peguambela untuk perayu, antara lainnya, berhujah bahawa: (a) bank itu telah mengubah kadar bunga tanpa memberi sebarang notis tentang perkara itu kepada perayu; dan (b) bank itu telah, tanpa pengetahuan perayu, membenarkan pihak ketiga itu mengingkari syarat-syarat perjanjian di antara mereka. Soalan utama yang timbul adalah sama ada, biarpun aduan-aduan perayu dibuktikan, mereka membentuk sebab yang mencukupi untuk enggan memberikan perintah jualan itu dengan mendirikan 'kausa bertentangan' di bawah s 256(3) Kanun Tanah Negara 1965 ('Kanun itu').

Diputuskan, menolak rayuan itu:

(1) 'Kausa bertentangan' dalam s 256(3) Kanun itu boleh didirikan cuma di dalam tiga kategori kes-kes: (i) di mana seorang penggadai berjaya membawa kesnya ke dalam mana-mana kekecualian kepada doktrin ketakbolehsangkalan dalam s 340 Kanun itu;

(ii) di mana seorang penggadai boleh menunjukkan bahawa pemegang gadaian telah gagal memenuhi syarat-syarat terdahulu untuk membuat permohonan untuk satu perintah jualan; dan (iii) di mana seorang penggadai boleh menunjukkan bahawa pemberian satu perintah jualan adalah bertentangan dengan sesuatu peraturan undang-undang atau ekuiti. Jika tiada kausa bertentangan boleh ditunjukkan, mahkamah terpaksa membuat satu perintah jualan (lihat ms 82F–G, 83F dan 83H–I); *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 dan *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 diikut.

(2) Di dalam kes ini, adalah tidak cukup untuk mendakwa keingkaran semata-mata oleh bank itu terhadap perjanjian di antara bank itu dan pihak ketiga ataupun keingkaran syarat-syarat lampiran kepada gadaian itu untuk menentang permohonan di bawah s 256(3) Kanun itu. Dakwaan bahawa bank itu telah bertindak melanggar kontrak itu, sedangkan ianya mungkin menimbulkan satu tindakan berasingan in personam, adalah tidak cukup dengan sendirinya untuk mengalahkan hak-hak ad rem bank itu di bawah gadaian berdaftarnya kepada satu perintah jualan. Adalah jelas bahawa perayu telah gagal memenuhi ujian undang-undang tentang apakah yang merupakan satu kausa bertentangan. Hakim itu dengan itu betul ketika membuat perintah jualan itu (lihat ms 87H dan 89C).

Per curiam:

Seorang hakim yang mendengar suatu permohonan di bawah s 256 Kanun itu mesti mengambil ingat bahawa prosedur di bawah seksyen itu sepatutnya cepat dan ringkas. Beliau pertama sekali mempertimbangkan sama ada pemegang gadaian itu telah memberikan notis statutori yang sesuai seperti yang diperuntukkan di dalam Kanun itu. Seterusnya, beliau mesti menentukan sama ada kehendak prosedur yang diperuntukkan oleh A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 telah dipatuhi. Selepas itu, beliau mesti mempertimbangkan soalan ketat sama ada keterangan yang dikemukakan di depannya oleh penggadai membentuk kausa bertentangan (lihat ms 88D).]

Notes

For cases on applications for an order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471–1500.

Cases referred to

American International Assurance Co Ltd v Union Builders (M) Sdn Bhd [1973] 1 MLJ 959 (refd)

Buxton & Anor v Supreme Finance (M) Bhd [1992] 2 MLJ 481 (refd) A
China and South Sea Bank Ltd v Tan [1989] 3 All ER 839 (refd)
Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)
Concha v Concha (1886) 11 App Cas 541 (refd)
Foster v Mentor Life Assurance Co (1854) 118 ER 1058 (refd)
Gaunt v Wainman (1836) 132 ER 335 (refd) B
Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (folld) C
Luggage Distributors [M] Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257 (refd)
Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196 (refd) D
Murugappa Chettiar v Letchumanan Chettiar [1939] MLJ 296 (folld)
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159 (refd)
Overseas Chinese Banking Corp Ltd v Lee Tan Hwa & Anor [1989] 1 MLJ 261 (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd) E
Phuman Singh v Kho Kwang Choon [1965] 2 MLJ 189 (refd)
Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32 (refd)
Simm v Anglo-American Telegraph Co (1879) 5 QBD 188 (refd)
Subchent Kaur v Chai Sau Kian [1958] MLJ 32 (refd)
United Malayan Banking Corp Bhd v Chong Bun Sun [1994] 2 MLJ 221 (refd) F
United Malayan Banking Corp Bhd (No 2) v Syarikat Perumahan Luas Sdn Bhd [1988] 3 MLJ 352 (refd)

Legislation referred to G

Land Code 1926 (Cap 138) s 149
National Land Code 1965 ss 256(3), 340(2), (4)(b)
Rules of the High Court 1980 O 83

Appeal from: Originating Summons No S2-24-456-1992 (High Court, Kuala Lumpur) H

Balwant Singh Sidhu (*Balwant Singh Sidhu & Co*) for the appellant.
Low Kim Leng (*Soo Thien Ming & Shahrizat*) for the respondent.

I

Gopal Sri Ram JCA (delivering the judgment of the court): We dismissed this appeal at the conclusion of the submissions of counsel for the appellant without calling upon counsel for the respondent. Ordinarily, we would not be minded to deliver written reasons for our decision in a case such as this.

A But, of late, there have been several appeals in which the issues which arose for decision were the same as those which have arisen for decision in the present case. We therefore consider it desirable to state written reasons for dismissing this appeal.

The facts relevant to the appeal are as follows. The appellant is the B registered proprietor of all that land held under HS (D) 2974 for Lot No 11041 in the Mukim of Sungei Buloh ('the said land'). On 2 October 1985, she executed a charge over the said land in favour of the respondent to secure a loan of RM600,000 granted by the respondent bank ('the bank') to one Zinger Feedmill Sdn Bhd ('the borrower'). This is commonly known among the members of the legal profession as a 'third C party charge'. It denotes a charge by a registered proprietor over his land to secure a loan made by the lender to a third party. As correctly submitted by counsel, it is nothing more than a secured guarantee.

The loan in the present case bore interest at 3.25% above the bank's prevailing base lending rate. The rate of interest and the other obligations inter se the appellant and the bank are set out in the annexure to the D instrument of charge.

The charge was duly registered in the appropriate land registry on 9 November 1985 and the loan disbursed to the borrower. The borrower having defaulted in making repayment of the principal and interest, the bank took out an application to enforce the statutory charge by way of an E order for sale. The appellant resisted the bank's application on several grounds, all of which were argued before us. However, none of them found favour with the learned judge who heard the application. He therefore made an order directing the sale of the land by public auction. It is against this order that the present appeal has been brought.

F Before us the appellant argued that the learned judge was wrong in making an order for the sale of the land. Counsel submitted that the order applied for ought to have been refused for three main reasons.

First, the bank had varied the rate of interest without giving any notice of the same to the appellant.

G Second, the bank had, without the appellant's knowledge, permitted the borrower to breach the terms of the agreement between them. In particular, the bank had allowed the borrower to use the facilities secured by the charge for the benefit of an unrelated company. Our attention was also drawn (as was the learned judge's) to the allegation that the bank had, without the appellant's knowledge or consent, permitted the borrower to H exceed the amount of the original loan facility. It was said that the appellant had never intended the charge over the land to secure such unauthorized use of funds or the excess in question.

Third, the appellant had received neither any demand nor the statutory notice in Form 16D. We think that this ground of complaint may be dealt with shortly. There was, in our opinion, sufficient material before the I learned judge to dispel any suggestion that Form 16D had not been duly served on the appellant. In our view, there is clearly no merit in this complaint.

We now turn to the first two complaints which may be conveniently taken together. The question that arises is whether, even if the complaints

made by the appellant are made out, they constitute sufficient reason for the refusal of an order for sale. This is a question of law which depends for its resolution upon the interpretation that is to be placed upon s 256(3) of the National Land Code 1965 ('the Code') and an appreciation of the decisions of our superior courts on that section.

Section 256 of the Code, the marginal note to which reads 'Application to court for order for sale', provides as follows:

> 256 (1) This section applies to land held under —
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> (a) registry title;
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> (b) the form of qualified title corresponding to registry title; or
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> (c) subsidiary title,
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> and to the whole of any divided share in, or any lease of, any such land.
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> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
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> (3) On any such application, the court shall order the sale of the land or lease to which the charge relates *unless it is satisfied of the existence of cause to the contrary*. (Emphasis added.)

The critical phrase in sub-s (3) of s 256 to which we have lent emphasis, despite having been the subject of judicial pronouncements, continues to demand the attention of courts. There is no doubt that, upon a plain reading of the subsection, a High Court is entitled to refuse an order for sale of charged property once it is satisfied of the existence of cause to the contrary. But the question then arises: what is meant by 'cause to the contrary'?

In our judgment, 'cause to the contrary' within s 256(3) may be established only in three categories of cases.

First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary. That section provides as follows:

> 340 (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible —
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) above will be held to have established cause to the contrary under s 256(3). The decision of Smith J in *Subchent Kaur v Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189, of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 at p 298 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what

> is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

In *Murugappa Chettiar* (ibid), the appellant was one of two co-proprietors of land. The proprietors jointly charged the land to the respondent as security for a loan. The chargee commenced proceedings under s 149 of the Land Code (Cap 138), the precursor to s 256(3), which read as follows:

> After such default in payment or observance continuing for the space of one month from the service of such notice or for such other period as may in such instrument be for that purpose limited, it shall be lawful for the chargee, by summons, to call the proprietor of the charged land before the court to shew cause why the land subject to the charge should not be sold by public auction under direction of the court. If no cause be shewn to the satisfaction of the court, it shall order the public sale of land to take place at such place and time as shall appear most suitable, but not less than four weeks from the date of the order, and it shall be the duty of the registrar of the court to see that such sale is publicly notified during these four weeks in such manner as may be usually adopted for such notifications for the time being, or as shall be regulated by any rules of court in that behalf.

The appellant alleged that he was liable for only half the loan amount and that he had made part payment of that sum. He paid the balance due from him into court and alleged that the other chargor who was liable for the remaining half was the nominee of the respondent chargee. All these allegations were not denied by the respondent chargee. The judge at first instance granted an order for sale without investigating any of these allegations. The FMS Court of Appeal held that there ought to have been an investigation into the unrefuted allegations, allowed the appeal and remitted the matter to the judge for trial of the issues. It was in this context that the remarks by Aitken J in the FMS Court of Appeal in the passage earlier quoted were uttered.

In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at p 460, the Privy Council, while acknowledging the existence of the proposition, limited its operation in the following terms:

> Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

A In a later passage, after reproducing s 340 of the Code, Lord Oliver of Aylmerton who delivered the opinion of the Board said:

> Even assuming — a point which does not arise in the instant case and has not been argued — that this section [ie s 340] might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish a 'cause to the contrary' for the purposes of s 256.

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It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar*'s case, the chargor must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s 256(3). As was observed by Harun Hashim SCJ (albeit in another context) when delivering the judgment of the Supreme Court in *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481 at p 487:

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> The issue as to the rights of an innocent purchaser for value, with or without notice of the charge as against a registered chargee has been considered by the courts and is now settled law: see eg *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81; *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54; *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 47. In all these cases, it was held that the interest of a registered chargee is indefeasible by s 340(1) of the Code unless it is made defeasible by s 340(2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the chargor and the chargee to defeat the interest of a third party. The interest of a bona fide purchaser for value cannot prevail over that of a registered chargee.

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Digressing for a moment, it is to be emphasized that here, as in other areas of our land law, it is important to distinguish between rights ad rem and rights in personam. That the Code expressly preserves this distinction was recognized by so learned a judge as Raja Azlan Shah J (as he then was) in *Mercantile Bank Ltd v The Official Assignee of the property of How Han Tek* [1969] 2 MLJ 196 at p 198:

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> The Official Assignee's view is not correct, *Vallipuram*'s case [*Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ 59] is against him. He forgets that independent of our land legislation our courts have always recognized equitable and contractual interests in land. See *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491. See also s 206(3) of the National Land Code.

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In the present context, an action brought to set aside a charge upon one or more of the grounds of defeasibility specified under s 340 of the Code is an action in rem. For when it succeeds, the consequence is to set at naught the chargee's rights under the registered charge as against the whole world. On the other hand, a chargor who is able to demonstrate that the chargee is under a personal obligation that binds his conscience not to enforce the

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charge, though not in a position to bring his case within one or more of the exceptions to the indefeasibility provision may nevertheless proceed to enforce that obligation against the chargee. This is an action in personam. The consequences of succeeding in such an action will have the effect of getting the chargee to defeat his own title or of depriving him of some or all of his rights under the registered charge, including the right to obtain an order for sale. See *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159.

Of course, it is not incumbent upon the chargor to bring an action to enforce the obligation of conscience operating against the chargee. He may, by establishing such an obligation of conscience, rely upon it to thwart an application under s 256 of the Code.

The important distinction between the enforcement of rights ad rem and rights in personam in the context of the Code was explained by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at p 758. We accept that what was there said correctly states the law upon the subject:

> To summarize, a claimant to any title or registrable interest in land may frame his case in one of two actions. If the facts pertaining to his claim enable him to bring his case within those vitiating categories specified under s 340(2) of the Code, then he may frame his case under one or more of those categories as an action in rem. If on the other hand, he is unable to bring himself squarely within the exceptions in favour of defeasibility, then, all is not lost to him: for, if he is able to constitute his complaints as an action in personam he may achieve the same result. Of course, as an action in personam, his claim may be subjected to all those discretionary considerations that operate in the grant or refusal of specific relief. In either case, he may be entitled to secure the status quo by the entry of a private caveat.
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> In matters of this nature, it is always of immense benefit to keep in mind the words of Thomson J (as he then was) in *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97, where he said [at pp 97–98]:
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> > 'To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights ad rem or personal rights and rights in rem or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right ad rem which is also a right in personam. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code which has the same effect in our law as appearance before the Praetor in the law of Rome, delivery of seisin in the old English feudal law and infeftment by registration in the Register of Sasines in the modern Scots law.
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> > Now, these observations are not academic. They are made to remind myself and to remind counsel of something we all know but are apt to overlook and which is a consideration in the light of which we must consider the particular transaction with which I am concerned in this case.'

A Returning to the discussion at hand, we would observe that the decision of the former Federal Court in *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32 and that of Eusoff Chin J (now Chief Justice of the Federal Court) in *Overseas Chinese Banking Corp Ltd v Lee Tan Hwa & Anor* [1989] 1 MLJ 261 are illustrative of cases that fall within the principle in *Murugappa Chettiar*'s case.

B In *Overseas Chinese Banking Corp Ltd v Lee Tan Hwa* (ibid), the bank with prior knowledge, acquired through common solicitors, that the chargor had entered into agreements with sub-purchasers for the sale of a portion of the land to them, accepted the creation of a registered charge in its favour as security for a loan made to the chargor. The chargor having C defaulted in making repayment, the bank applied for an order for sale under s 256 of the Code. The sub-purchasers intervened and opposed the making of the order. The learned Chief Justice having expressly negatived fraud, nevertheless refused the bank's application. We find it instructive to quote from his judgment (at p 263):

D > Under the circumstances, I hold that the plaintiff knew through their solicitors that the interveners were purchasers of a portion of the land. *The charge of the whole land to the plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the two defendants.* There is nothing to prevent the plaintiff from proceeding against the defendants or any party who was negligent in handling the charge transactions.
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> E *Now that the first intervener had completed the purchase and had gone into possession, it would not be justified and would be plainly unconscionable to deprive him of the shophouse he had bought by holding that the charge was valid when in fact it was void,* and consequently I refused to grant the plaintiff's application to have the land sold by public auction. (Emphasis added.)

F In the absence of such strong and compelling reasons as were present in *Narayanasamy* or *Lee Tan Hua*, a court would not be justified in witholding relief to a chargee under s 256 of the Code. To act otherwise would be to ignore the mandatory language of s 256(3) read with s 340(1) of the Code. See *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650.

G As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the H chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under s 256(3) of the Code. An allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale.

I We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s 256(3) of the Code. But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys

deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of the security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realize their security through an order for sale. Financial institutions would then become reluctant to lend money to bona fide entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.

On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.

Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the

A task of dealing with applications under s 256 to properly appreciate their true role assigned to them by Parliament.

We have said that s 256(3) must be read narrowly. It does not, however, follow from this that the chargor who is unable to satisfy the court of cause to the contrary is left without any remedy whatsoever. B Allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an action in personam against the chargee.

Take the facts of this very case. Based upon what we have said thus far, it is clear that the instant appellant failed to meet the requisite legal test C of what amounts to a cause to the contrary. The judge therefore quite correctly made the order for sale.

But that does not bring the matter to an end. It is open to the appellant to bring an action in personam for breach of contract against the bank based upon the first and second grounds of complaint advanced by counsel during argument, subject to the proof of any alleged breach as well D as any defences that may be fairly available to the chargee, including the plea of limitation. However, it is no answer for the respondent to say that the appellant's claim is barred by issue estoppel or res judicata.

A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute E cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.

Further, an order for sale made pursuant to s 256 of the Code is not F a judgment. That was settled by the decision of the Supreme Court in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p 258):

> Here, there was no judgment debt. *The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor* G *in default under the provisions of the National Land Code 1965.* The appellant's claim was not under a covenant but under the registered charge. (Emphasis added.)

His Lordship in that case drew support for his view from the judgment of Ong CJ (Malaya) in *American International Assurance Co Ltd v Union* H *Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95.

In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court affirmed this principle and held that the making of an order for sale upon the failure of a chargor to satisfy the court that there existed cause to the contrary did not bar a subsequent action in personam brought by the chargor based upon the same facts that did not avail him in opposing the I application under s 256. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) set out the relevant law in the following terms:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale

in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our courts which have correctly stated the law upon the subject. In *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almarhum Sultan Idris* [1933] MLJ 18, the appellant (chargee) had taken a summons under s 149 of the Land Code 1926 for an order of sale of the charged premises. The respondent pleaded that he could not be sued because there was an Order in Council dated 8 January 1888 which stated:

> 'No Member of the Royal Family of Perak (Waris Negri) is liable *to be sued for debt* in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident. (Emphasis added.)'

Apparently no permission had been obtained as required by the Order in Council. Thorne AG CJ in the Court of Appeal held [at p 19]:

> 'It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
>
> ... I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt', but he applies for leave to exercise his rights as a chargee. *The proceedings result not in a judgment or decree, but in making or refusal of an order of sale.* (Emphasis added.)'
>
> That decision was followed in *Murugappa Chettiar v Lechumanan Chettiar* [1939] MLJ 296, *Mercantile Bank of India v TF Egan & Anor* [1940] MLJ 288 and *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257.

It is equally settled law that in order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a *final* judgment or decree: 16 *Halsbury's Laws of England* (4th Ed) para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s 256 of the Code, he is not barred from bringing a fresh action against the

chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

For our part, we would affirm what has been said in the foregoing passage as accurately representing the law upon the subject. It will be seen that the Supreme Court in *Kandiah* was not establishing any new proposition, but merely applying earlier pronouncements. The judgment of the Supreme Court ought therefore to give rise to no difficulty. Yet, it would appear the decision has not been properly appreciated.

In *United Malayan Banking Corp Bhd v Chong Bun Sun* [1994] 2 MLJ 221 at p 239, Visu Sinnadurai J, referring to the judgment in *Kandiah* said:

> This decision of the Supreme Court has now been interpreted by some to mean that, even after an order for sale had been made, there is nothing to prevent the chargor from having a second bite at the same cherry by once again commencing an action to oppose the making of the order. A wide interpretation of the Supreme Court decision would mean that the chargor's right to commence a fresh action is not limited to the tentative specified circumstances stated above. The Supreme Court, by holding that the chargor may institute a subsequent action, 'raising the same or similar facts and issues as those raised in the foreclosure proceedings', appears to be opening the floodgates to allow chargors to challenge the order for sale made by the court, not by way of an appeal to the Supreme Court, but by commencing an action before the same court.
>
> The danger of so opening the floodgate is obvious: there will be no finality in the order for sale made by a court in foreclosure proceedings, and the rights of the purchaser at the auction sale may never be secure, as it is always open to challenge by the chargor at any time, for whatever reasons, including those which had been rejected by the court in the earlier foreclosure proceedings.
>
> The extent to which the decision of the Supreme Court in *Kandiah Peter* affects the current law and practice relating to foreclosure proceedings, remains to be seen. However, I must state that that decision has already been cited before me in support of various propositions, including that of saying that a judge, after making an order for sale is not functus officio; and that a date for the public auction ordered in pursuance of the order for sale made by the court in the foreclosure proceedings, ought not to be made until after it was certain that the chargor was not intending to challenge the order for sale in a subsequent action.
>
> As none of these propositions are directly relevant for the purposes of the present applications, I express no views on the decision. But, I may add, that the decision has far-reaching consequences, and lawyers acting for banks and other financial institutions, may be well advised to bear this decision in mind when advising their clients as to whether an order for sale ought to be sought on default by the chargee. Certainly, the decision appears to go much further than what was decided in the earlier cases. As already stated, the earlier cases seem to indicate that the chargor who is dissatisfied with the decision of the court in making an order for sale, may either appeal against the decision of the court in ordering the order for sale or he may challenge the sale to a third party pursuant to the order for sale

on the ground that the sale was improperly conducted, as was the situation in *M & J Frozen Food Sdn Bhd* [*M & J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294].

It is hoped that the Supreme Court in the very near future will have the opportunity to reconsider these issues and cases and restate the principles applicable, so that the present confusion and uncertainties in the law would be overcome.

We must confess our inability to discern any 'wider proposition' that *Kandiah* establishes. All that case did was to reaffirm well-established principles. At the risk of repetition, we emphasize that, by their very nature, proceedings under s 256 are not concerned with any contractual claims that the chargor may have against the chargee. They are concerned with the very narrow and limited question whether the chargor has adduced facts that establish cause to the contrary in the sense we have earlier discussed. If the chargor is unable to sustain his opposition to the making of an order for sale — a proceeding in rem — he may nevertheless sue the chargor in personam for breach upon the personal covenant or in equity for such relief as may be appropriate. The issue in the latter action is whether facts emerge that reasonably support a breach of contract or an equitable remedy such as an action for an account. Such an action will, of course, be subject to all available defences, at law and in equity, and to the wide discretion of the court to refuse specific relief in the exercise of discretion according to settled principles.

When properly understood, there is therefore nothing in the decision in *Kandiah* that permits a chargor in a subsequent action to set aside an order for sale granted by the court inter partes. That may not be done in the absence of an allegation of fraud in the procurement of the order. See *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143. If a chargor is unhappy with an order for sale made inter partes, his only remedy is to appeal against it as has been done in the present case. All that *Kandiah* decides is that the making of an order for sale does not bar an action in personam between the same parties.

In our judgment, the problem falls to be resolved by reference to the doctrine of estoppel. It matters not what form the estoppel takes. It may take the form of a plea of res judicata or cause of action estoppel or issue estoppel in the sphere of adjectival law. It may appear in some other form to affect rights that may exist under substantive law. Whatever its label, there are certain basic features that are inextricably woven into the fabric of the doctrine.

One such feature is mutuality or reciprocity. For estoppel to apply, it must bind both parties to a dispute. If, for any reason, only one party will be estopped but not the other, if their roles were reversed, then the doctrine does not bite. See *Gaunt v Wainman* (1836) 132 ER 335; *Foster v Mentor Life Assurance Co* (1854) 118 ER 1058; *Concha v Concha* (1886) 11 App Cas 541 at p 553, per Lord Herschell LC; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 at p 203, per Bramwell LJ.

A An examination of the legal position reveals that the requirement of reciprocity is not met in relation to proceedings under s 256 of the Code.

Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may B sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842.

C Thus, in the absence of any special circumstances, a chargee who has obtained an order for sale is not barred by res judicata or any other form of estoppel from pursuing actions in personam against the chargor or the surety. The test of mutuality or reciprocity is, accordingly, not met. Consequently, no legitimate ground may be advanced to bar the chargor D from mounting an action in personam against the chargee, eg for breach of contract or for failure to furnish proper accounts.

When viewed from this standpoint, it is plain that the decision in *Kandiah* is not only correct but also just.

Where an order for sale is made in the absence of the chargor, then, E the court is not functus officio for the purposes of hearing an application by the chargor to set it aside. See *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352. We are not prepared to — indeed we cannot — predict all the issues that may arise upon such an application. Each case depends on its own facts. However, F we will go so far as to say that one of the issues that will certainly arise upon such an application will be whether the chargor has established cause to the contrary.

Once these elementary propositions of law are understood, there need be no fear of confusion or of floodgates.

G For the reasons we have given in this judgment, the appeal was dismissed with costs. All orders made by the judge in the court below were affirmed. The deposit paid into court by the appellant was ordered to be paid out to the respondent to account of its taxed costs.

Appeal dismissed.

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Reported by Kevin Ooi

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